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In The

# Supreme Court of the United States

MICKY A. SMITH and J. SCOTT BROWN, *et al.*,

*Petitioners,*

v.

FORD MOTOR COMPANY, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Third Division**

## RESPONDENT FORD MOTOR COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In an unpublished opinion, the intermediate appellate state court affirmed a state trial court's opinion that jurors' background and experience are not extraneous prejudicial information under OKLA. STAT. tit. 12, § 2606(B).

The question presented here is whether this Court has jurisdiction to review a state court decision interpreting only state law in an appeal arising from a civil jury trial where no federal question was ever raised, argued or decided.

## LIST OF PARTIES

The additional respondents in this case are Five Star Ford, Inc., an Oklahoma corporation, and Reynolds Ford, Inc., an Oklahoma corporation.

## CORPORATE DISCLOSURE STATEMENT

Respondent Ford Motor Company is a publicly-held corporation whose shares are traded on the New York Stock Exchange. Ford Motor Company has no parent corporation. No publicly-held company owns more than 10% of Ford Motor Company's stock.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vi |
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE PETITION | 4 |
| SUMMARY OF REASONS | 4 |
| I. PETITIONERS WAIVED ANY FEDERAL QUESTION BY FAILING TO RAISE IT BELOW | 5 |
| II. NO FEDERAL QUESTION IS PRESENTED IN THIS APPEAL FROM A CIVIL JURY TRIAL IN STATE COURT INTERPRETING STATE LAW | 5 |
| A. The Seventh Amendment's Right to Jury Trial Only Applies to Civil Cases in Federal Courts | 6 |
| B. In Civil Jury Trials in State Courts, the Fourteenth Amendment Only Guarantees Due Process According to that State's Laws | 6 |
| III. THIS APPEAL ONLY INVOLVES A QUESTION OF STATE LAW | 8 |

TABLE OF CONTENTS – Continued

Page

IV. THE PETITIONERS' SUGGESTION THAT THE RIGHT TO A FAIR TRIAL IS UNDER ASSAULT BY AGENDA-DRIVEN JURORS IS IMMATERIAL ..... 10

V. THE PETITIONERS' SUGGESTION THAT A CONFLICT EXISTS BETWEEN STATE COURTS IS IMMATERIAL ..... 11

VI. THE DECISION BELOW IS CORRECT .... 11

A. The Jurors' Testimony Demonstrated that No Extraneous Prejudicial Information Influenced Their Deliberations .. 12

B. Jurors' Background and Experience Are Not Extraneous Prejudicial Information Under Oklahoma Law ..... 15

C. The Petitioners Make Factual Misstatements Regarding the Jurors' Deliberations ..... 19

1. Melton did not perform an experiment using an exhibit not admitted into evidence ..... 19

2. There was no competent evidence Melton performed mathematical equations not admitted into evidence ..... 21

3. There was no competent evidence Crane researched or discussed federal regulations not admitted into evidence ..... 21

TABLE OF CONTENTS – Continued

Page

4. Melton did not conduct a teaching seminar on force vectors ..... 23

5. Melton's comment that he influenced his fellow jurors is immaterial ..... 24

6. There was no competent evidence that the jurors favored a verdict for the petitioners until hearing Melton's analogy ..... 25

VII. THE TRIAL EVIDENCE SUPPORTS THE JURY'S VERDICT ..... 26

CONCLUSION ..... 34

## TABLE OF AUTHORITIES

Page

CASES

*American National Bank & Trust Co. of Sapulpa v. BIC Corp.*, 880 P.2d 420 (Okla. Civ. App. 1994) ..... 16

*Bledsoe v. Truster*, 839 P.2d 673 (Okla. Civ. App. 1992), *cert. denied*, Oct. 28, 1992 ..... 17, 25

*Bouie v. City of Columbia*, 378 U.S. 347 (1964) ..... 9

*Bush v. Gore*, 531 U.S. 98 (2000) ..... 9

*Glossip v. State*, 29 P.3d 597 (Okla. Crim. App. 2001) ..... 17

*Hankins v. State*, 213 N.W. 344 (Neb. 1927) ..... 18

*Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931) ..... 6

*Harris v. Boggess*, 255 P. 685 (Okla. 1927) ..... 25

*Hawkins v. State*, 46 P.3d 139 (Okla. Crim. App. 2002) ..... 15, 16

*Hernandez v. New York*, 500 U.S. 352 (1991) ..... 12

*Hoover v. Ronwin*, 466 U.S. 558 (1984) ..... 5

*McDonald v. Pless*, 238 U.S. 264 (1915) ..... 9

*Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.), *aff'd*, *Hill v. McKeithen*, 409 U.S. 943 (1972) ..... 6

*Mullaney v. Wilbur*, 421 U.S. 684 (1975) ..... 9

*Nalley v. Kellwood Co.*, 867 P.2d 1336 (Okla. Civ. App. 1993), *cert. denied*, Jan. 18, 1994 ..... 16

TABLE OF AUTHORITIES – Continued

Page

*Negrate v. Gunter*, 285 P.2d 194 (Okla. 1955) .....17

*Patton v. Yount*, 467 U.S. 1025 (1984) .....10, 25

*Pearson v. Yewdall*, 95 U.S. 294 (1877).....6

*Peoples Fin. & Thrift Co. v. Ferrier*, 129 P.2d 1015 (Okla. 1942).....17

*Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).....11

*Smith v. Ford Motor Co.*, No. 104,134, slip op. (Okla. Civ. App. Nov. 7, 2008).....3, 10, 15, 19

*Smith v. Phillips*, 455 U.S. 209 (1982).....8

*Smith v. State*, 656 P.2d 277 (Okla. Crim. App. 1982).....17

*Stade v. Bodycote Thermal Processing, Inc.*, 99 P.3d 733 (Okla. Civ. App. 2004) .....3

*Swift & Co. v. Kirkley*, 131 P.2d 998 (Okla. 1942).....17

*Tanner v. United States*, 483 U.S. 107 (1987).....13, 19

*Thompson v. Krantz*, 137 P.3d 693 (Okla. Civ. App. 2006) .....25

*Walker v. Sauvinet*, 92 U.S. 90 (1875).....7, 8

*Weatherly v. State*, 733 P.2d 1331 (Okla. Crim. App. 1987) .....17

*Willoughby v. City of Okla. City*, 706 P.2d 883 (Okla. 1985).....17

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

U.S. CONST. amend. VII ..... 4
U.S. CONST. amend. XIV ..... 4
OKLA. CONST. art. 2, § 6 ..... 7
OKLA. CONST. art. 2, § 19 ..... 7
OKLA. STAT. tit. 12, § 2606(B) ..... 2, 8, 13
28 U.S.C. § 1257 ..... 5
28 U.S.C. § 1257(a) ..... 1
Sup. Ct. R. 10 ..... 12
Sup. Ct. R. 10(b) ..... 11
Okla.Sup.Ct.R. 1.200(a) ..... 15
Okla.Sup.Ct.R. 1.200(b)(5) ..... 15

## JURISDICTION

This Court lacks jurisdiction to review decisions by state courts interpreting state law where no federal question was ever raised, argued or decided. 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

This appeal arises out of a nearly head-on collision between a 2001 Ford Expedition and a 2000 Ford F-250 traveling at highway speeds. The petitioners sued respondents in Oklahoma state court alleging state law tort causes of action sounding in products liability, negligence, and breach of warranties.

The petitioners' statement of the case purports to detail what they allegedly "proved" at trial. Whether these statements are considered mere inferences or factual misstatements, they are not relevant to whether this Court should grant certiorari. Even if all of the petitioners' statements about the evidence at trial were true, there would still be no basis for this Court to review the unpublished decision below because no federal question was ever raised, argued or decided.

Whether the Expedition had an alleged defect and the actual cause of the crash were hotly contested factual issues at trial. The parties spent three weeks presenting testimony by fact witnesses and numerous

experts and admitting thousands of pages of exhibits in support of their respective positions. The jurors ultimately rejected what the petitioners here claim they "proved." The trial court entered judgment in favor of all respondents based on the jury's verdict.

Relying on affidavits of petitioner Micky Smith's sister and investigators hired by petitioners' counsel, the petitioners sought a new trial alleging that the mechanical background and experience of three jurors constituted "extraneous prejudicial information" under OKLA. STAT. tit. 12, § 2606(B). It is undisputed, however, the jurors fully disclosed their background and experience during voir dire. The petitioners have never alleged that the jurors misrepresented their background or experience or their ability to decide the case without bias.

Four months after trial and over the respondents' objections, the trial court heard testimony from several jurors, petitioner Micky Smith's sister and the petitioners' hired investigators. The petitioners offered no evidence the jury was exposed to extraneous prejudicial information, and the jurors testified their deliberations were based only on the evidence presented. Consequently, the trial court denied the petitioners' motion for new trial and ruled that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." *See* Order Denying Motion for New Trial at 2 (Nov. 29, 2006).

The petitioners appealed. In an unpublished opinion the Oklahoma Court of Civil Appeals rejected the petitioners' argument that a juror's background constitutes extraneous prejudicial information:

> The record reflects the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence. While Appellants complain about certain jurors' use of their personal background and experience in mechanics during deliberations, such background and experience was fully disclosed during voir dire. The jurors were instructed to use their common sense, and in doing so, every juror brought his/her own set of experiences and background to the deliberations process. The mere fact that some jurors sitting on a particular jury may have experience or knowledge particularly relevant to the issues in the case does not disqualify them from active participation in deliberations, much less amount to prejudicial juror misconduct. The record discloses that deliberations in this case were conducted as they were "intended to be, and should be, private, frank, and free discussions of the questions under consideration." *Stade v. Bodycote Thermal Processing, Inc.*, 2004 OK CIV APP 70, ¶ 6, 99 P.3d 733, 735.

*See Smith v. Ford Motor Co.*, No. 104,134, slip op. at 8-9 (Okla. Civ. App. Nov. 7, 2008) (footnote omitted)

(Pet. App. at 9a). The Oklahoma Supreme Court denied further review without an opinion.

## REASONS FOR DENYING THE PETITION

### SUMMARY OF REASONS

Any federal question, if such even exists in this appeal, has been waived by the petitioners' failure to raise it below. The petitioners' attempt to raise a federal question by making a passing reference to the Seventh and Fourteenth Amendments to the United States Constitution for the first time in the petition for a writ of certiorari is untimely. And even if the petitioners had raised those amendments below, they are not applicable in this appeal from a civil jury trial in state court involving only a question of state law.

The Oklahoma intermediate appellate court's unpublished opinion below is consistent with long-standing Oklahoma precedent. The court below did not err in applying the facts to the law, and the jury's verdict is supported by the evidence.

For these reasons, and as detailed below, Respondent Ford Motor Company respectfully submits that this Court should deny the petition for a writ of certiorari.

## I. PETITIONERS WAIVED ANY FEDERAL QUESTION BY FAILING TO RAISE IT BELOW.

This Court will not consider claims on certiorari neither raised nor determined below. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). The petitioners never raised a federal question at any stage of the proceedings below, and thus, have waived any federal question.

## II. NO FEDERAL QUESTION IS PRESENTED IN THIS APPEAL FROM A CIVIL JURY TRIAL IN STATE COURT INTERPRETING STATE LAW.

This Court's jurisdiction to review a final judgment by the highest court of a state is limited to those cases involving a federal question. 28 U.S.C. § 1257. This appeal arises from a civil jury trial in state court involving only questions of state law. No federal question was ever raised, argued or decided below.

In their petition to this Court (and for the first time in this case), the petitioners cite the Seventh and Fourteenth Amendments as grounds to set aside the judgment. The petitioners fail, however, to suggest how or why either amendment applies under the circumstances of this case or was otherwise violated below. The petitioners' reliance on these amendments is misplaced.

### A. The Seventh Amendment's Right to Jury Trial Only Applies to Civil Cases in Federal Courts.

The Seventh Amendment applies only to courts of the United States and not to state courts. *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877) ("We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States."). This Court's interpretation of the Seventh Amendment has not changed. *See, e.g., Melancon v. McKeithen*, 345 F. Supp. 1025, 1048 (E.D. La.) (Seventh Amendment does not guarantee a right to trial by jury in state civil cases), *aff'd*, *Hill v. McKeithen*, 409 U.S. 943 (1972). "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure." *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Instead, a state may establish its own procedures and practices regarding the conduct of civil litigation including the right to trial by jury. *Id.*

### B. In Civil Jury Trials in State Courts, the Fourteenth Amendment Only Guarantees Due Process According to that State's Laws.

It is unclear whether petitioners are alleging a deprivation of due process with regard to their motion for new trial or suggesting that due process incorporates the substantive protections of the

Seventh Amendment in state civil jury trials, a suggestion this Court has historically and repeatedly rejected.

To the extent the petitioners suggest they were deprived due process, there is still no basis for review by this Court. The petitioners never argued below that they were deprived of due process guaranteed under either the Oklahoma or the United States Constitution. Any due process challenge has been waived.

Further, "[d]ue process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker*, 92 U.S. at 93. This Court's "power over that law is only to determine whether it is in conflict with the supreme law of the land." *Id.*

The Oklahoma Constitution guarantees litigants the right to trial by jury. OKLA. CONST. art. 2, § 19 ("right of trial by jury shall be and remain inviolate"). The petitioners received their jury trial.

The petitioners made a passing suggestion below that the alleged juror misconduct violated their right of access to the courts without prejudice under Oklahoma's Constitution. *See* OKLA. CONST. art. 2, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."). The court below rejected all of the

petitioners' alleged errors. "All questions arising under the Constitution of the State alone are finally settled by the judgment below." *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

Further, the procedure utilized below is wholly consistent with this Court's interpretation of due process for allegations of juror misconduct. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 217-18 (1982) (post-trial evidentiary hearing sufficient due process for deciding allegations of juror misconduct). As this Court has explained, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.* at 217. "[I]f in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." *Id.* at 218.

## III. THIS APPEAL ONLY INVOLVES A QUESTION OF STATE LAW.

The question presented below was whether the jurors' subjective background and experience constituted extraneous prejudicial information under OKLA. STAT. tit. 12, § 2606(B). No federal question was ever raised, argued or decided below.

"[C]omity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law," which practice "reflects [this

Court's] understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring, joined by Scalia, J. and Thomas, J.). This is especially true with regard to allegations of juror misconduct. *See McDonald v. Pless*, 238 U.S. 264, 266 (1915) ("In the very nature of [alleged juror misconduct] the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules."). The question of what constitutes extraneous prejudicial information under Oklahoma law is not reviewable by this Court.

This Court will only review a state court's interpretation of state law in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). The only plausible "extreme circumstance" would be if the court below interpreted Oklahoma law beyond what a fair reading of that law would permit so as to constitute a denial of due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352-55 (1964). The petitioners have not suggested any extreme circumstance in this case. Any such suggestion would be untenable because the lower court's decision is consistent with longstanding precedent by Oklahoma appellate courts. *See* Proposition VI.B below.

## IV. THE PETITIONERS' SUGGESTION THAT THE RIGHT TO A FAIR TRIAL IS UNDER ASSAULT BY AGENDA-DRIVEN JURORS IS IMMATERIAL.

The petitioners suggest that the constitutional right to a fair and impartial jury is under assault by agenda-driven jurors. Pet. at 10-13. It is not clear how the petitioners' suggestion raises a question reviewable by this Court. The question of agenda-driven jurors was never raised below and, thus, cannot form a basis for this Court's jurisdiction.

Further, as this Court has recognized, voir dire is the prime safeguard "we have relied on since the beginning" to identify juror bias. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). The parties below engaged in nearly four days of voir dire, with counsel for the petitioners using the majority of that time. *See* Trial Tr. Vols. IV, VI-X. The three jurors with mechanical background and experience fully disclosed that experience during voir dire. *See* Trial Tr. Vol. IV at 413:15-420:12; Trial Tr. Vol. VII at 697:20-702:15, 706:17-707:17, 710:21-711:15, 779:20-785:20; Trial Tr. Vol. VIII at 868:9-21, 894:19-896:10, 901:10-904:2; and Trial Tr. Vol. IX at 970:17-974:14. The appellate court below recognized that the "background and experience was fully disclosed during voir dire" and the petitioners never attempted to strike those jurors for cause. *Smith*, No. 104,124, slip op. at 8-9 n.5 (Pet. App. at 9a).

The petitioners fail to identify even a scintilla of evidence any juror had any agenda, the verdict was affected by any agenda, or that any juror was exposed to the propaganda which the petitioners reference. The petitioners never alleged any of the jurors failed to disclose any material fact or provided false testimony about their background or secreted some subversive agenda.

## V. THE PETITIONERS' SUGGESTION THAT A CONFLICT EXISTS BETWEEN STATE COURTS IS IMMATERIAL.

The petitioners suggest that the courts of last resort of various states interpret extraneous prejudicial information differently. Pet. at 14-21. Decisions by Oklahoma courts interpreting extraneous prejudicial information are not binding on the courts of any other states. The reverse is also true.

A conflict among lower courts involving questions controlled by state law is not a reason for granting certiorari. *See, e.g., Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). Because the alleged conflict, if it even exists, arises solely as a result of individual states applying their own laws, review by this Court is not warranted. *Id.*; *see also, e.g.*, Sup. Ct. R. 10(b).

## VI. THE DECISION BELOW IS CORRECT.

Based on the unique facts presented during the post-trial hearing, the court below concluded the petitioners failed to present any evidence of

extraneous prejudicial information affecting the jurors' deliberations.[1] This Court defers to factual findings by state courts on direct review of state court judgments. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) (and cases cited therein); *see also* Sup. Ct. R. 10. Further, the factual determinations by the court below are supported by the record and consistent with Oklahoma law and this Court's jurisprudence.

### A. The Jurors' Testimony Demonstrated that No Extraneous Prejudicial Information Influenced Their Deliberations.

The trial court heard testimony over the respondents' objections from jurors Bert Duke (Duke), Mary Harding (Harding), Glenda Wilson (Glenda Wilson), Charles Crane (Crane), Vera Beth Wilson (Vera Wilson), Jennifer Allen (Allen) and jury foreperson Clay Earl Melton (Melton). Transcript of Proceedings Had On January 4, 2006 at 1-151 (Juror Tr.).[2] The jurors testified their deliberations were not affected by extraneous prejudicial information.

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[1] The petitioners alleged numerous other errors in the motion for new trial and in subsequent appellate briefing. The court below rejected all of the petitioners' alleged errors. Alleged juror misconduct is the only issue raised here.

[2] The respondents objected to the jurors' testimony because Oklahoma law does not permit a party to impeach a verdict by examining the jurors' deliberation process. Specifically,

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Melton testified, "**We had nothing but what you gave us.**" Juror Tr. at 148:8 (emphasis added). He testified he did not need to "look anything up or do any research about" the evidence. *Id.* at 143:10-13, and 144:25-145:4. He did not "go out and buy any Timken bearings and try to do any type of experiment on [his] own." *Id.* at 145:5-8. None of the jurors brought anything into the deliberation room that was not evidence in the case. *Id.* at 145:12-16. None of the jurors went to the accident scene, brought any outside materials into the deliberations, or did any experiments on bearings. *Id.* at 148:5-8.

Melton further testified the deliberations were based only on the evidence presented at trial. Juror Tr. at 148:1-4. The other jurors agreed. Duke testified Melton did not discuss anything other than the

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Oklahoma law prohibits jurors from testifying "as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations." OKLA. STAT. tit. 12, § 2606(B). Instead, a "juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Id.* This Court recognizes that "the near-universal and firmly established common-law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a jury verdict," with an exception for situations involving allegations that extraneous influence affected the jury. *See Tanner v. United States*, 483 U.S. 107, 117 (1987).

evidence presented at trial. *Id.* at 44:8-11. Vera Wilson testified, "I think they were commenting on things that they heard from the witness stand." *Id.* at 85:5-7. She made her "decision on the evidence that was presented," and "all the time [she] was thinking about the evidence and weighing the evidence." *Id.* at 88:16-23. Allen testified she did not remember deliberations about evidence she "did not hear from the witness stand." *Id.* at 94:3-6.

The trial court concluded the jury considered only the evidence presented and rejected the petitioners' argument that the backgrounds of certain jurors constituted extraneous prejudicial information. The trial court found the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." *See* Order Denying Motion for New Trial at 2 (Nov. 29, 2006). The Oklahoma Court of Civil Appeals affirmed in an unpublished opinion.[3] The court held there was "no

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[3] That the opinion below is unpublished demonstrates that not only does this appeal not present an important federal question, the court below did not consider the questions decided important enough to warrant publication. Under Oklahoma law, an opinion is released for publication only if it:

> (1) Establishes a new rule of law or alters or modifies an existing rule;
>
> (2) Involves a legal issue of continuing public interest;
>
> (3) Criticizes or explains existing law;

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evidence suggesting that any of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed." *Smith*, No. 104,124, slip op. at 8 (Pet. App. at 8a-9a). The record showed "the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence." *Id.* at 8-9 (Pet. App. at 9a).

### B. Jurors' Background and Experience Are Not Extraneous Prejudicial Information Under Oklahoma Law.

The decision below is consistent with Oklahoma law. "[I]information coming from the juror's own subjective experiences and background" is not extraneous prejudicial information. *Hawkins v. State*, 46 P.3d 139, 148 (Okla. Crim. App. 2002). Rather, extraneous prejudicial information is "information

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(4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;

(5) Resolves an apparent conflict of authority; or

(6) Constitutes a significant and non-duplicative contribution to legal literature:

(a) by an historical review of law; or

(b) by describing legislative history.

Okla.Sup.Ct.R. 1.200(a). Furthermore, "[b]ecause **unpublished opinions** are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked **shall not be considered as precedent by any court**." *Id.* at 1.200(b)(5) (emphasis added).

injected into the deliberation process from the outside." *Id.*

Jurors are supposed to bring their background and experience into the deliberation process. *Nalley v. Kellwood Co.*, 867 P.2d 1336 (Okla. Civ. App. 1993), *cert. denied*, Jan. 18, 1994. In *Nalley*, the losing party sought a new trial based on jurors' remarks during deliberations in which supposedly extraneous information and personal views were brought into the jurors' discussion. *Id.* at 1338. The court held the record, "contrary to showing extraneous influence or misconduct, indicate[s] the jury acted as the process intended – the jurors brought their thoughts and backgrounds to their deliberations." *Id.*

Similarly, in *American National Bank & Trust Co. of Sapulpa v. BIC Corp.*, 880 P.2d 420, 424 (Okla. Civ. App. 1994), the court held jurors' discussions during deliberations of their experiences with lighters similar to those at issue in a products liability action did not constitute extraneous prejudicial information. During deliberations one juror mentioned an experience with a lighter that would not extinguish and another juror mentioned an experience with a lighter that flared up and singed his mustache. *Id.* The court found these instances, "unconnected to BIC and not involving injury to person or property, do not constitute juror misconduct warranting new trial." *Id.*

Oklahoma law provides examples of what constitutes extraneous prejudicial information. Examples include situations where, unlike here: (1) the jury

considered the results of a juror's independent investigation, *Willoughby v. City of Okla. City*, 706 P.2d 883, 887 (Okla. 1985); (2) the jury received exhibits that were not introduced into evidence, *Negrate v. Gunter*, 285 P.2d 194, 195-97 (Okla. 1955); (3) the jurors had possession of an exhibit excluded by the trial court and independently viewed the premises where the accident occurred, *Swift & Co. v. Kirkley*, 131 P.2d 998, 998-99 (Okla. 1942); (4) the jurors had a memorandum used by counsel in support of argument but not admitted into evidence, *Peoples Fin. & Thrift Co. v. Ferrier*, 129 P.2d 1015, 1017-18 (Okla. 1942); (5) the jury consulted "outside reference material, including but not limited to Bibles or other religious documents, dictionaries, or any other reference book," *Glossip v. State*, 29 P.3d 597, 605 (Okla. Crim. App. 2001); (6) the jury had been exposed to improper polygraph test evidence, *Weatherly v. State*, 733 P.2d 1331, 1335-36 (Okla. Crim. App. 1987); (7) the bailiff made statements to the jury during deliberations, *Smith v. State*, 656 P.2d 277, 285 (Okla. Crim. App. 1982); and (8) the jury received information about a witness' deposition which had been excluded, *Bledsoe v. Truster*, 839 P.2d 673, 676 (Okla. Civ. App. 1992), *cert. denied*, Oct. 28, 1992.

The petitioners failed to present any evidence showing extraneous prejudicial information. Instead, the evidence showed the jurors brought only their background and experience into the deliberation process. The state court's interpretation of extraneous

prejudicial information under Oklahoma law is consistent with longstanding Oklahoma precedent.

Presumably all jurors bring their background and experience into the deliberation process. It is impossible to separate jurors from their background and experience. That is the essence of the jury system:

> **Jurors are not mere automatons. Some latitude must be left them to present to their fellow jurors their arguments and their reasons for their beliefs based on the evidence. They do not shed their personalities and their experiences of life when they begin their deliberations.**

*Hankins v. State*, 213 N.W. 344, 347 (Neb. 1927) (emphasis added) (no misconduct where juror with experience operating cash registers discussed during deliberations fact that cash registers do not make mistakes).

The deliberation process necessarily includes the collective background and experience of all the jurors. The court below did not err.[4]

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[4] The petitioners suggest the lower court restricts the scope of extraneous prejudicial information to a physical object taken into the jury deliberation room. Pet. at 14. The petitioners fail to provide a pinpoint cite to support that suggestion. The court below does not pronounce such a hard line distinction between internal and external influences. Instead, the court merely examined the record and affirmed the trial court's ruling that the petitioners failed to present any evidence of extraneous

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### C. The Petitioners Make Factual Misstatements Regarding the Jurors' Deliberations.

The petitioners misstate the jurors' testimony and claim certain jurors conducted an experiment, performed extraneous mathematical equations, conducted a teaching seminar, read regulations outside of deliberations and gave expert testimony in the deliberation room.[5] Most of the juror testimony on which the petitioners rely was the result of improper and leading questions by the petitioners' counsel during a post-trial hearing. Contrary to the petitioners' misstatements, the jury discussed the evidence and the inferences to be drawn from it based on their backgrounds and experience.

#### 1. Melton did not perform an experiment using an exhibit not admitted into evidence.

The petitioners state Melton conducted an experiment using an exhibit (a "nearby soup or

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prejudicial information. *Smith*, No. 104,124, slip op at 6-10 (Pet. App. at 6a-10a). As this Court recognizes, the distinction between external and internal influences is "not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation." *Tanner*, 483 U.S. at 117.

[5] These same misstatements were addressed in detail by the respondents below and rejected by the lower courts.

beverage can") not offered into evidence. Pet. at 8. Melton did not perform an "experiment" or use an exhibit not admitted into evidence. Rather, Melton used an "**analogy**" of a tin can to explain his understanding of the evidence presented at trial. Juror Tr. at 117:12-118:21 (emphasis added). Melton elaborated:

> The analogy of the tin can on the arm, if you look inside the hub where everybody can see the same thing and there was in-depth discussion by the experts of how the marks got there and there were marks – basically identical marks on the outer race of the outer wheel bearing and the inner race of the inner wheel bearing. The only difference between them is they were 180 degrees apart.

*Id.* at 138:2-9. Melton testified "I think I did that to explain how the marks would have gotten on the opposite race and 180 degrees out." *Id.* at 143:17-18. Melton's analogy was consistent with the trial testimony of respondents' expert witness regarding Brinell marks[6] appearing 180 degrees apart on the bearing race found at the accident scene. *Compare id.* at 138:2-9 and 143:17-18 *with* Trial Tr. Vol. XXX at 4324:6-4326:3. Furthermore, jurors Harding, Glenda Wilson, Crane, and Vera Wilson did not even recall Melton's tin can analogy. Juror Tr. at 51:15, 62:3-5, 71:22-25 and 81:11-21.

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[6] A Brinell mark is a distinctive mark created when one piece of metal impacts into another piece of metal with significant force.

### 2. There was no competent evidence Melton performed mathematical equations not admitted into evidence.

The petitioners state Melton performed mathematical equations to educate other jurors about how forces and force vectors cause bearings to break. This assertion is based on Duke's testimony in response to a leading question by the petitioners' counsel. Juror Tr. at 46:11-16. On direct examination, however, Melton himself denied performing any mathematical equations during deliberations. *Id.* at 140:23-25. No other juror confirmed Duke's testimony. *Id.* at 57:21-25, 66:13-16, and 87:8-20.

### 3. There was no competent evidence Crane researched or discussed federal regulations not admitted into evidence.

The petitioners contend Crane discussed federal regulations not offered into evidence. Pet. at 8-9. In the proceedings below, the petitioners identified Melton as the individual who testified Crane had done some reading about dial indicators.[7]

Melton merely testified, "[Crane] said he had read something that showed [a dial indicator] was for

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[7] A dial indicator is an instrument used to measure small distances including the amount of play in a wheel for evaluating bearings.

the trucking industry." Juror Tr. at 121:13-14. Melton elaborated, however, that he could not be sure if Crane had read something. *Id.* at 121:15-17. He further testified Crane only mentioned some regulation in "general terms" and Melton could not even remember if Crane used the word "regulation" or "law." *Id.* at 122:10-16. The petitioners never questioned Crane about discussing or reading regulations during deliberations. *Id.* at 70:21-78:8. It is undisputed Crane disclosed during voir dire his opinion that grabbing the wheel and rocking it to "check it for end play" is an appropriate method for evaluating bearings but then noted that "the proper way . . . is put a dial indicator on it." Trial Tr. Vol. VII at 781:2-782:13.

Further, Melton testified the deliberations regarding the use of dial indicators were based on the evidence admitted at trial. Juror Tr. at 122:1-9 and 146:20-147:5. When Vera Wilson testified about the jurors' deliberation regarding regulations and dial indicators, she stated, "**I think they were commenting on things that they heard from the witness stand**." *Id.* at 84:17-85:7 (emphasis added).

The jurors' testimony regarding their deliberations is consistent with the evidence presented at trial. Anthony Skipper, the wheel bearing manufacturer's representative, testified dial indicators are not required for vehicles like the Expedition. Trial Tr. Vol. XXIX at 4075:18-4080:14; and Trial Tr. Vol. XXVIII at 4028:19-4036:25. Other witnesses at trial also testified that dial indicators were not required

for passenger vehicles like the Expedition. Trial Tr. Vol. XIII at 1590:13-17; and Trial Tr. Vol. XIV at 1757:1-13.

### 4. Melton did not conduct a teaching seminar on force vectors.

The petitioners claim Melton conducted a seminar for the other jurors on force vectors. Pet. at 8. Melton testified he did not discuss principal direction of force or force vectors during deliberations, and his discussions of the evidence were based on his common sense. Juror Tr. at 115:9-13 and 140:17-22. Melton's testimony is consistent with the other jurors' recollections. *Id.* at 46:17-19, 58:23-25, 61:19-24 and 81:8-10.

The jurors' deliberations were not a teaching seminar. Duke testified, "Well, we didn't teach nobody. We just explained stuff that the other ones had questions on." Juror Tr. at 39:17-18. Harding testified, "we all discussed backyard mechanics, shade tree mechanics." *Id.* at 52:2-3. Glenda Wilson testified, "I don't know that he [Melton] was trying to teach it. He was just trying to explain the best he could." *Id.* at 63:17-18. Vera Wilson testified, "Well, different people had different theories, and we talked about those theories." *Id.* at 82:12-13. Similarly, Allen testified, "**I feel like that, you know, we were allowed to take our common knowledge into the room, and that's all anybody inserted into the conversation was things that they had as their**

**common knowledge**. . . . " *Id.* at 98:6-10 (emphasis added).[8]

### 5. Melton's comment that he influenced his fellow jurors is immaterial.

The petitioners claim Melton bragged that the petitioners might have prevailed if he or Crane had not been on the jury. Pet. at 8. The petitioners cite the hearsay testimony of an investigator hired by the petitioners' counsel rather than Melton's own testimony. When asked about this statement, Melton testified, "If I said anything even close to that, it wasn't verbatim. But I'm sure that Mr. Crane and I explained certain mechanical aspects." Juror Tr. at 129:18-20.

Any juror could state that his or her involvement on the jury made a difference. That certainly does not constitute extraneous prejudicial information under

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[8] The petitioners' counsel told the jurors at trial to use their common sense when listening to the evidence and when deliberating the case. During opening statements, the petitioners' counsel told the jurors, "When you go in the jury room and begin to do your deliberations in this case, one of the things that you will not check at the door is your common sense." Trial Tr. Vol. XI at 1391:20-23. The petitioners' counsel repeated this sentiment during closing, telling the jurors: "One, of course, is just use your common sense. None of you just got to town yesterday. We all have life experience and common sense things that help us make decisions every day. Use your common sense." Trial Tr. Vol. XXXVI at 5112:8-12.

Oklahoma law. *See Bledsoe*, 839 P.2d at 676 ("intra-jury influences" are not extraneous prejudicial information).

### 6. There was no competent evidence that the jurors favored a verdict for the petitioners until hearing Melton's analogy.

The petitioners claim that when the jurors focused on the evidence, the majority favored a verdict for the petitioners. Pet. at 8. The petitioners never submitted any credible evidence that the jurors originally intended a verdict for the petitioners. Instead, the petitioners cite to portions of the jurors' testimony where they discussed their deliberations in detail and what discussions influenced their decisions.

Each juror must express his or her understanding of the evidence. These "intra-juror" influences are not extraneous prejudicial information under Oklahoma law. *Bledsoe*, 839 P.2d at 676.

The trial court found no evidence of extraneous prejudicial information. Under Oklahoma law, the trial court's ruling on juror misconduct following an evidentiary hearing "'will not be disturbed [on appeal] where there is evidence reasonably supporting such finding.'" *Thompson v. Krantz*, 137 P.3d 693, 698 (Okla. Civ. App. 2006) (quoting *Harris v. Boggess*, 255 P. 685, 685-86 (Okla. 1927)). Deference to the trial court's decision based on personal observations of the testifying jurors is consistent with this Court's jurisprudence. *Patton*, 467 U.S. at 1038

(weighing juror testimony "is essentially one of credibility, and therefore largely one of demeanor" and "the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'").

The decision below, based on the jurors' testimony, is correct. There is no error for this Court to review.

## VII. THE TRIAL EVIDENCE SUPPORTS THE JURY'S VERDICT.

The petitioners suggest Melton and Crane "used their influence to procure a verdict that is diametrical to the evidence presented at trial." Pet. at 21. It is possible the jurors disbelieved the petitioners' experts' untested theories. Indeed, the petitioners' experts offered "final" opinions in reports and depositions and then changed those opinions after respondents proved they were wrong. Trial Tr. Vol. XX at 2868:25-2879:24. The evidence at trial was not as one-sided as the petitioners suggest. If it was, it favored the respondents. As demonstrated below, the respondents' evidence supports the jury's verdict.

On July 24, 2003, Petitioner Micky Smith and his wife, Elizabeth Ashley Smith, purchased the 2001 Expedition used from Reynolds Ford.[9] Two days later

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[9] The previous owners had the Expedition serviced at Five Star Ford after noticing a humming noise coming from the front end. A mechanic replaced the right front outer bearing and

(Continued on following page)

in the early morning hours Mrs. Smith, along with her brother Thomas Ashton Brown and her infant son, began a trip from Norman, Oklahoma to the family's vacation home in Colorado. The accident occurred late afternoon that same day in New Mexico on an undivided, two-lane highway with painted lines and no center median.

The petitioners sued the respondents alleging the inner bearing[10] of the Expedition's left front wheel suffered a fatigue fracture which caused the Expedition to suddenly veer left into a head-on collision with a Ford F-250. The respondents' evidence presented at trial disproved the petitioners' defect allegation.

The evidence at the accident scene did not support the petitioners' defect allegation. The respondents presented evidence showing that if there had been a bearing failure, there would have been

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cleaned and replaced the right inner bearing. The mechanic reset the pre-load for the left front wheel and would have inspected, repaired or replaced the left front bearings if they had been loose at that time. The previous owners then drove the Expedition another 8,900 miles without experiencing any steering, braking or handling problems, before trading it in for a newer Expedition.

[10] Each of the front wheels on the Expedition has two bearings, an inner and an outer bearing. The inner and outer bearings each consist of an outer race, tapered rollers, and an inner race. The wheel hub assembly includes the grease cap, the cotter pin, nut retainer, the spindle nut, the bearing retainer washer, and the outer and inner bearing.

pre-impact debris along the highway before the point of impact in the direction from which the Expedition was traveling. However, the component parts from the left front wheel, including the cotter pin and pieces of the bearing, were found at the Expedition's post-accident point of rest, not along the highway before the accident site. The respondents' evidence also showed that when bearings seize, the wheel stops rotating which would have left marks on the tire and the road prior to impact. However, there were no marks on the left front tire or on the roadway prior to impact. Additionally, there was no physical evidence on the roadway that Mr. Brown applied the Expedition's brakes before impact. There were, however, tire marks on the roadway from the on-coming Ford F-250.

The petitioners claim the Expedition "suddenly" crossed the center line of the highway. Pet. at 2. While that was petitioners' theory, respondents presented evidence that the Expedition crossed the center line at a gradual 3 to 4 degrees. Trial Tr. Vol. XXVI at 3698:8-20.

The condition of the component parts at issue did not support the petitioners' defect allegation. The respondents' metallurgical expert, Dr. Edward J. Caulfield, examined the bearing race using an electron microscope and testified the Brinell marks on that race were caused by the tremendous forces generated in the crash. Dr. Caulfield supported his hypothesis with testing, unlike the petitioners' experts who offered no testing to support their defect

allegation. First, Dr. Caulfield conducted drop-tests on an exemplar bearing race and determined that the markings on the exemplar and the subject bearing race were consistent. Second, he installed a fractured inner front bearing race into an exemplar Ford F-150. The exemplar vehicle was then test-driven for more than 330 miles. The drivers did not experience any braking, steering or handling problems. Additionally, the size of the fracture remained constant. A second bearing race was fractured all the way through and installed on an Expedition driven for 180 miles around a test track without any problems.

Contrary to the petitioners' suggestion, Pet. at 7, Dr. Caulfield did not reverse his position, stumble over himself, defy Timken or disregard Timken's recommended procedures. Trial Tr. Vol. XXXIII at 4710:10-4713:16. Furthermore, Dr. Caulfield re-affirmed that the marks observed on the Expedition's bearings were Brinell marks caused by the tremendous forces generated in the crash. Trial Tr. Vol. XXX at 4336:16-23.

The respondents' automotive mechanical engineer, Mr. Robert Pascarella, conducted impact testing on an exemplar hub assembly and testified the damage to the subject bearings was consistent with impact damage rather than fatigue. He also testified the braking system of the Expedition was operational before the crash and, consequently, the bearing did not fail and cause the crash.

That the alleged defect did not cause the crash was further supported by the testimony of Mr. Skipper from Timken, the bearing manufacturer. Mr. Skipper testified there was no evidence on the bearing of heat damage, *i.e.*, that the bearing had seized to the spindle. He also testified the rollers found at the crash site did not appear to be under any stress, and they were not discolored from heat. He further testified there was no evidence of a bearing malfunction and that the subject bearing would have been functioning at the time of impact. Mr. Skipper also testified the damage to the Expedition's bearings was not caused by fatigue.

In response to questions by the petitioners' counsel, Mr. Skipper, who has more than 37 years in the design and performance of wheel bearings, testified a fracture all the way through the bearing race is **only** possible from an impact. He explained it is impossible for a bearing to experience a fatigue fracture driving down the road because the stress mechanism is not present. He also testified a bearing cannot break into pieces in the hub assembly due to fatigue. Rather, Mr. Skipper testified, it would take a considerable impact to fracture a bearing assembly.

It was also undisputed this was a severe accident. Dr. Greg Smith, the respondents' accident reconstruction expert, testified this was the most severe accident he had ever reconstructed. Dr. Smith opined the Expedition was traveling 61 mph and the Ford F-250, towing a trailer, was traveling 56 mph at

impact. After the nearly head-on collision, the Expedition was knocked backward and rolled over to its point of rest. Dr. Smith testified there was extensive damage to the Expedition including: (1) the left side frame rail was buckled and bent; (2) the entire engine compartment and drive shaft were pushed rearward; (3) the front axle had been rotated; (4) the entire front end had been twisted to the right; and (5) grass and scrapes going in different directions suggested multiple rolls.

Dr. Smith testified the left front wheel impacted the ground twice during the accident sequence. Dr. Smith testified it was the "slam down" of the left front wheel that broke the bearings in the left front wheel. Other experts for respondents also testified the left front wheel bearing broke as a result of the tremendous accident forces.

The petitioners claim they proved that Ford's Critical Concern Review Group was aware of a wheel bearing failure rate of 25%. Pet. at 5. This claim was based on a document produced by Ford Motor Company which stated, "Cross Truck Line Action – Wheel Bearings (P131 Job # 1 implementation) Problem: Current bearing design will not meet 150K Mile requirement without adjustment, noise or failure." It was undisputed, however, this document related to the Ford Super Duty line of vehicles (*i.e.*, those designated as the PN131) which does not have the same front wheel bearings as the Expedition at issue in this case. Trial Tr. Vol. XXXII at 4555:11-24.

The petitioners claim there were 2,742 separate warranty complaints for failed bearings in Ford light trucks. Pet. at 5. Here, the petitioners are referring to summaries of bearing warranty records printed from Ford's warranty database.[11] Those records included vehicles, such as the E-350, which utilize different bearing designs. *See* Defendant Ford Motor Company's Motion to Strike Plaintiffs' Exhibit 60.1 (Sept. 7, 2005). Those records merely showed that bearings are a serviceable component part. None of those warranty records referenced any other incident where a fatigue fracture in an inner bearing race led to a catastrophic failure causing a sudden loss of control. *Id.* at 2655:22-2656:10. Indeed, none of the experts had ever seen a similar incident. Trial Tr. Vol. XVI at 2193:11-21; Trial Tr. Vol. XVIII at 2486:23-2487:21; Trial Tr. Vol. XXIX at 4125:17-25; and Trial Tr. Vol. XXXII at 4552:1-15.

The petitioners claim if the Expedition had been one of Ford's "Quality Checked" used vehicles, it would have undergone a 115-point inspection by Ford-certified mechanics. Pet. at 3. It was undisputed,

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[11] The petitioners' witness originally represented to the court and the jury that there were 4,190 warranty records. Trial Tr. Vol. XIX at 2652:12-16. Ford's counsel had those warranty records counted and discovered there were only 2,742 warranty records. Trial Tr. Vol. XXXIV at 4731:11-4732:13. Consequently, the trial court gave a curative instruction regarding the number of warranty records. *See* Jury Instructions Given to the Jury this 8th Day of September, 2005 by Tom A. Lucas, District Judge (Sept. 12, 2005).

however, the subject Expedition was not part of Ford's "Quality Checked" program. Trial Tr. Vol. XV at 1988:16-22; and Trial Tr. Vol. XXI at 3012:14-22. Further, the 115-point inspection does not even mention "wheel bearings." Trial Tr. Vol. XV at 1879:12-1880:16.

The petitioners claim respondents Five Star Ford and Reynolds Ford should have advised the Expedition's original owners to bring the Expedition in for a 30,000-mile check-up because "either dealership would have routinely checked all wheel bearings." Pet. at 3. It was undisputed, however, the 30,000-mile scheduled maintenance of the 2001 Ford Expedition did not include inspection of the wheel bearings. Trial Tr. Vol. XIII at 1582:4-7; and Trial Tr. Vol. XV at 1890:7-15.

Using a special verdict form, and answering interrogatories, the jury found that: (1) the 2001 Ford Expedition did not have a defect and was not unreasonably dangerous; (2) Ford Motor Company was not negligent in its design or manufacture of the Expedition; (3) Five Star Ford was not negligent in its repair of the Expedition; (4) Mr. Brown, the driver of the Expedition, was negligent; (5) Mr. Brown's negligence was the direct cause of Mr. Brown's death; and (6) Mr. Brown's negligence was the sole cause of the accident. Consequently, the jury attributed 100% of the fault to Mr. Brown. *See* Special Verdict Form (Sept. 9, 2005).

The evidence admitted at trial supports the jury's verdict. There is no error for this Court to review.

## CONCLUSION

Respondent Ford Motor Company respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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